

**Decision Memo – USDA Forest Service
Breeze Family Limited Partnership
Agricultural Irrigation and Livestock Watering System Easement for
Morton Ditch
Under the Colorado Ditch Bill Act of 1986**

**Arapaho and Roosevelt National Forests & Pawnee National Grassland
Sulphur Ranger District
Grand County, Colorado
September 2009**

I. DECISION

A. Description of Decision

It is my decision to approve the conditioning of an *Agricultural Irrigation and Livestock Watering Easement (Easement)* under the Colorado Ditch Bill Act of 1986, being issued to the Breeze Family Limited Partnership (BFLP) for the purpose of operating and maintaining a water conveyance system known as the Morton Ditch. Conditions will be incorporated into the Easement by way of an Operation and Maintenance Plan and optional provisions. The Morton Ditch is located in Section 2, T1S, R78W, 6th Principal Meridian (PM), Grand County, Colorado (Exhibit A).

Under the terms of the Act of 1986, this Easement will be granted without fees.

The Morton Ditch is owned and operated by the BFLP, and provides irrigation water to private lands adjacent National Forest System (NFS) lands. The water conveyance system on NFS lands is comprised of a rock diversion structure in Little Muddy Creek that sends water to a headgate, and then down approximately 500 feet of ditch. The remainder of the ditch is on private lands. The ditch can be accessed by foot from the BFLP private property, but if vehicle access is needed, either by ATV, small truck or small heavy equipment, it is provided on a two-track path that leads from the south end of the BFLP private land to NFS lands near the headgate. The width of the right-of-way is 50 feet wide, in order to include a cut bank above the ditch which may need maintenance, and a berm adjacent to it which could accommodate small heavy equipment for maintenance access. This width appears to be the area historically required for ditch operation and maintenance. Operation and maintenance of the Morton Ditch has previously been authorized under a special use permit issued to Carl G. Breeze. The original ditch bill easement application was filed on behalf of the Estate of Carl G. Breeze, and the BFLP has subsequently requested the processing be continued in their name. The members of BFLP are descendants of Carl G. Breeze.

The water right associated with the Morton Ditch is 1.5 cubic feet/second as appropriated on June 6, 1911 and adjudicated on November 5, 1937.

Conditions authorizing the following items will be imposed for the operation and maintenance of the Morton Ditch and associated facilities.

- Noxious weed treatment and prevention will be required
- Field inspection for threatened, endangered and sensitive (TES) plant species will be completed by the Forest Service prior to any earth disturbing activities at the headgate or for any new ground disturbance. On the Morton Ditch, there is not likely to be any new area disturbed. Routine ground disturbing maintenance activities within the ditch require no additional plant survey work.
- About 225 feet of the access route and ditch are located within the Kelly Creek Inventoried Roadless Area. No standing trees will be cut in that segment. If trees blow down and block the ditch or access route, they may be cut. No new access is needed. Any ground disturbing activity in that area will require District Ranger approval.
- Willows and other shrubs on the ditch bank may be removed or cut and scattered as needed.
- Use of a backhoe or small dozer will be permitted within the ditch profile, for routine maintenance such as cleaning out sedimentation and shrub growth. Heavy equipment brought in to the Easement area will be power washed prior to entering NFS lands.
- Require acceptance of a Recovery Agreement from the U.S. Fish and Wildlife Service (USFWS).
- With the Holder, evaluate the need for the rock, lumber, tarp and T-post diversion structure above the headgate. If a diversion is needed, replace with a rock weir or vane structure. Design will be provided by the Sulphur Ranger District Hydrologist.
- Place a locking mechanism on the headgate wheel to prevent tampering with the gate.
- Ensure that headgate configuration allows water to bypass diversion when not needed for irrigation.
- Remove trash from headgate area.
- Restrict use of access route for ditch access and maintenance only.
- Provide rock armoring or drainage on wet segment of access route, outside of roadless area, as needed.

B. Purpose of Decision

While granting of such Easements is non-discretionary and, therefore, not a Federal action subject to analysis or review (FSM 2729.16f), analysis was conducted for this use to determine if there was a need for additional conditioning of the Easement for operation and maintenance activities, and for the protection of TES species. The purpose of this decision is to document any environmental concerns associated with the operation and maintenance of the ditch, and its potential affect on TES species, and to document the need for any additional conditioning of the Easement necessary to protect the environment from degradation due to continued operation of the water conveyance system.

II. REASONS FOR CATEGORICALLY EXCLUDING THE DECISION

Decisions may be categorically excluded from documentation in an Environmental Impact Statement (EIS) or Environmental Assessment (EA) when they are within one of the

categories identified by the U.S. Department of Agriculture in 7 CFR part 1b.3 or one of the categories identified by the Chief of the Forest Service in 36 CFR 220.6(e), and there are no extraordinary circumstances related to the decision that may result in a significant individual or cumulative environmental effect. Supporting documents for this project will be retained in a project file on the Sulphur Ranger District in Granby, Colorado.

A. Category of Exclusion

The project is within the category of exclusion in 36 CFR 220.6(e) (15): *Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are no changes to the authorized facilities or increases in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization.*

The Morton Ditch has previously been authorized under special use permit number SUL 5072-01. The permit was issued on July 18, 1969 to Carl G. Breeze, with no termination date, however it did include a clause that stated if the permitted facilities transferred ownership, a new permit would be required. Mr. Breeze died in February 1994, and his estate pursued issuance of an easement under the ditch bill law to authorize the existing facilities. There is no change in the operation of the facilities.

B. Relationship to Extraordinary Circumstances

There are no conditions that would constitute a significant effect on an extraordinary circumstance related to the proposed Easement. This conclusion is based on evaluation of the following items:

1. Federally listed Threatened, Endangered, Proposed and Forest Service Sensitive Species or their Critical Habitat (Endangered Species Act: Section 7.) – A Biological Report for Wildlife was prepared and approved on January 22, 2009, for this Easement application. The Summary of Determinations on page 22 of the report shows:

- A determination of “No Effect” for Canada lynx, a threatened species.
- A determination of No Impact for the American three-toed woodpecker, bald eagle, boreal owl, greater sage grouse, northern goshawk, northern harrier, olive-sided flycatcher, American marten, North American river otter, North American wolverine, pygmy shrew, boreal toad and northern leopard frog.
- Terms and conditions recommended for protection of wildlife and plant species will be included in the authorization.

A Biological Evaluation (BE) was prepared for fish species. The determination in the BE was “No Impact” for the Mountain sucker and the Colorado River cutthroat trout.

A Biological Assessment (BA) dated January 23, 2009, was prepared for four down stream fish species, listed as Federally endangered. The fish species are: bonytail chub, Colorado pikeminnow, humpback chub, and razorback sucker. The BA provided a determination of

"Likely to Adversely Affect" for all four species and their down stream critical habitat. A Biological Opinion dated May 21, 2009, was received from the U.S. Fish and Wildlife Service (USFWS) stating the proposed action would not jeopardize the four endangered fish species if certain terms and conditions were met. To comply with these terms and conditions, the Easement Holder has accepted a Recovery Agreement, in which they have enter into an agreement with the USFWS to support recovery operations for the four down stream fish species. The USFWS Recovery Program was intended to be the reasonable and prudent alternative for individual projects to avoid the likelihood of jeopardy to the endangered fishes from depletions from the Upper Colorado River Basin.

A letter to the file for TES plants was prepared on 11/10/2008. The letter states that there were no occurrences or suspected occurrences of threatened, endangered, proposed or sensitive plant species in the project area. No consultation with the USFWS was required. Suitable habitat for several Forest Service Sensitive species, and species of local concern was located. Recommendations made for protection of TES plants are included in the easement. .

An effects determination of "No Effect" is warranted for Threatened and Endangered plants. An impacts determination of "may adversely impact individuals, but not likely to result in a loss of viability on the Planning area, nor cause a trend to federal listing" is warranted for sensitive plans in the project area.

2. *Floodplains and Wetlands* – A Water Resources Report was prepared by the District Hydrologist, dated April 16, 2009. Recommendations were made for the design of the diversion structure in the creek, headgate security, and maintaining free-board in the ditch. This proposal will have no effect on floodplains and wetlands.

3. *Municipal Watersheds* – All National Forest System lands are sources of water for municipalities. Continued use of this water for irrigation purposes will have no effect on a public water supply; therefore there are no effects on this circumstance.

4. *Congressionally Designated Areas* – There are no such designated areas in the project area, there fore there will be no effects on this circumstance.

5. *Research Natural Areas and Inventoried Roadless Areas* – The project area lies within the Broken Rack Geographic Area, which does not have any Research Natural Areas in it, therefore there will be no effects on this circumstance.

About 225 feet of the access route and ditch are within the Kelly Creek Inventoried Roadless Area (IRA). No new road construction or reconstruction, or cutting of standing timber is necessary to continue the operation and maintenance of the Morton Ditch. Regional Office review of a proposed action in an IRA has been completed, and approval provided to move forward with the proposed action. This project will have no effect on the Kelly Creek IRA.

6. *Native American Religious or Cultural Sites, or Areas* – The Morton Ditch was reviewed by a Forest Service Archaeologist. His findings are documented in a letter dated September 25, 2007. There are no known American Indian religious or cultural sites, or archaeological sites in the project area. Therefore, there will be no effect on this circumstance as a result of this project.

7. Archaeological Sites or Historic Properties or Areas – A Forest Service Archaeologist has made a determination that conditioning of the Easement will not have the potential to adversely affect historic properties as defined by the National Historic Preservation Act. No consultation with the State Historic Preservation Office will be necessary. Per a letter dated September 25, 2007, the Sulphur Ranger District has no further obligations under Section 106 of the National Historic Preservation Act, provided that the project area or methods of implementation are not modified. Therefore, there will be no effect on this circumstance as a result of this project.

III. OTHER RESOURCES CONSIDERED

A. Invasive species

Populations of Canada thistle were found within the Morton Ditch right-of-way. The Holder will be required to begin treatment of this invasive species in 2010, and continue treatment on an annual basis until they are eliminated. The Easement will contain specific conditions concerning prevention and management of invasive weed species. These conditions govern use of certified weed-free seed, hay, and mulch, treatment of invasive species, and cleaning of any equipment brought to the site to be sure it is free of invasive plant species.

B. Soil Erosion

The Ditch and diversion areas were examined for erosion problems. There is no erosion on the ditch itself; it is heavily overgrown and in need of mechanical cleaning. The headgate area is stable. The access route just above the ditch has potential for erosion, as does the bluff to the west of the ditch. These areas need to be monitored during inspections for any increase in erosion and appropriate measures taken as needed.

C. Access

The Morton Ditch is accessed either by foot along the ditch bank from private property or by ATV on a two track access route from the applicants private property. The route is traversable by a pickup truck if needed, or small heavy equipment.

D. Vegetation Management

There are scattered dead lodgepole along the access route and ditch line. There is no need to cut standing timber anywhere along the ditch or access route. Trees may be cut and removed when they fall across the access route or ditch. Willow and shrubs along the ditch bank may be cut or mechanically removed.

IV. SCOPING

Processing of the Easement has been listed in the Arapaho & Roosevelt National Forests and Pawnee National Grassland (ARP) Schedule of Proposed Actions since January of 2008. Interested parties were notified of the project in a letter dated April 16, 2008. Two letters of response were received. They are summarized as follows:

- Grand County Board of Commissioners had no concerns about the proposed action.
- Mr. Wendell Funk had several concerns. He did not support issuance of the easement. *Response: Issuance of the easement is non-discretionary, and is not the purpose of this decision.* He stated that the flows should be reduced to minimum needs. *Response: Flows are based on State appropriated water rights, and are not a part of this decision.* He requested that the area authorized be reduced to the width of the "ditch proper". *Response: The area being authorized is that of historic use and is needed for operation and maintenance of the ditch. This includes responsibility for treating noxious weeds that have been introduced along the ditch bank by ditch operations.* Eliminate the two-track road. *Response: The access route is needed to operate and maintain the ditch. Use of the route is minimal, and not open to the public. Walking from private land will be encouraged unless motorized access is necessary.*

V. FINDINGS REQUIRED BY AND/OR RELATED TO OTHER LAWS AND REGULATIONS

My decision will comply with all applicable laws and regulations. I have summarized some pertinent ones below.

Federal Land Policy Management Act of 1976 (FLPMA) as amended by Public Law 99-545, of October 27, 1986 (Colorado Ditch Bill): The Colorado Ditch Bill Act directed the Secretary of Agriculture to issue permanent Easements to owners of certain qualifying water development facilities used to divert water for agricultural irrigation and/or livestock watering purposes on NFS lands in 17 western states. These facilities include ditches, reservoirs, pipelines, canals, etc. The Morton Ditch meets the eligibility requirements for an Easement under this authority.

Forest Plan Consistency (National Forest Management Act) - This Act requires the development of long-range land and resource management plans (Forest Plans). This project was evaluated under the guidance of the 1997 Revision of the Land and Resource Management Plan for the ARP. The Forest Plan provides guidance for all natural resource management activities on the Forest. The Act requires that all projects and activities be consistent with the Forest Plan.

The project area lies within the Broken Rack Geographic Area, and Management Area 1.3 Backcountry Recreation. The Forest Plan Desired Condition does not address the presence of special use authorized facilities. The Plan does state that winter range condition should be enhanced by noxious weed control. Noxious weed treatment will be required under the Easement. The Plan states that no timber harvest or road construction will occur. This Easement will require neither. It states that summer motorized activities are prohibited. Minimal motorized access is needed for operating this ditch. The Holder will be encouraged to walk to the headgate and ditch from private land, unless motorized access is absolutely necessary.

The conditioning of this Easement is consistent with the Forest Plan for the Broken Rack Geographic Area.

Environmental Justice (Executive Order 12898) – This Order requires consideration of whether projects would disproportionately impact minority or low-income populations. This decision complies with this Act. Public involvement did not identify any adversely impacted local minority or low-income populations. This decision is not expected to adversely impact minority or low-income populations.

National Environmental Policy Act – This Act requires public involvement and consideration of potential environmental effects. The entirety of documentation for this decision supports compliance with this Act.

Effects of Alternatives on Social Groups – There will be no effects on minorities, Native Americans, women or the civil liberties of any other American citizen.

Effects of Alternatives on Prime Rangeland, Forest Land and Farm Land – The proposal presented is in compliance with Federal Regulations for prime range, forest and farm lands. The definition of prime forest land does not apply to lands within the ARP. There are private agricultural lands adjacent to the NFS lands where the project area lies, and the Ditch provides agricultural irrigation to those lands. The Ditch is beneficial to these adjacent private agricultural lands.

Energy Requirements and Conservation Potential of Alternatives – The energy required to implement the proposal in terms of petroleum products would be insignificant when viewed in light of the production costs and effect of the national world wide petroleum reserves. Very little petroleum-based energy will be expended in the operation and maintenance of this water conveyance system.

Air Quality – This project will have no effect on air quality. There will be minor use of motorized equipment for maintenance of the ditch, and minimal dust created from operation and maintenance of the system.

Wild and Scenic Rivers Act – There are no designated Wild or Scenic Rivers on the Sulphur Ranger District, therefore this project will not affect any such rivers.

VI. ADMINISTRATIVE REVIEW OR APPEAL

This decision is not subject to a higher level of administrative review or appeal pursuant to 36 CFR 215.12(f).

VII. IMPLEMENTATION DATE

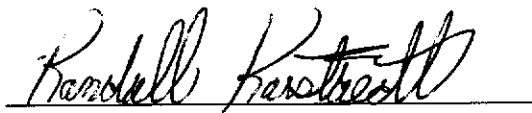
This decision may be implemented immediately. An Easement will be issued under the terms of the Colorado Ditch Bill Act, with terms and conditions necessary to protect the environment from degradation.

VIII. CONTACT PERSON

Further information about this decision can be obtained from Patricia Hesch, Lands Staff at the Sulphur Ranger District, 9 Ten Mile Drive, P.O. Box 10, Granby CO 80446; Phone (970) 887-4136; FAX (970) 887-4102, or electronically at phesch@fs.fed.us.

IX. SIGNATURE AND DATE

I have concluded that this decision may be categorically excluded from documentation in an EIS or EA as it is within category 36 CFR 220.6(e)(15), and there are no extraordinary circumstances related to the decision. My conclusion is based on information presented in this document and the entirety of the Planning Record.



For ANTOINE DIXON
Deputy Regional Forester
Rocky Mountain Region, R-2
Forest Service, Department of Agriculture

December 1, 2007
Date

"The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, S.W., Washington, DC 20250-9410, or call (800) 795-3272 (voice) or (202) 720-6382 (TDD). USDA is an equal opportunity provider and employer."

Exhibit A: Morton Ditch Vicinity Map, SUL 272
Arapaho & Roosevelt National Forests and Pawnee National Grassland
T1S, R78W, Section 2, 6th PM, Grand County, Colorado
Sulphur Ranger District

